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## BALANCING THE SCALES OF JUSTICE: EXPANDING ACCESS TO MITIGATION SPECIALISTS IN MILITARY DEATH PENALTY CASES

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*On October 27, 1995, Fort Bragg's Towle Stadium was filled with soldiers. At 6:30 in the morning, 1,300 members of the 82d Airborne were gathered for a run. . . . Their commander, Colonel John Scroggins, gave a pep talk over the public address system . . . . [Sergeant] Kreutzer had been in the woods nearby for an hour. It was foggy and still dark, but the stadium, lit by eight banks of lights, was as bright as day. Kreutzer scanned the field through the sight of a Ruger .22-caliber semiautomatic rifle. Slung across his back was a CAR-15 semiautomatic rifle, a far more powerful weapon. At his side were more than 500 rounds of ammunition. . . . His first shot shattered the spine of Chief Warrant Officer Abraham Castillo, who stood about 50 feet from most of the troops. . . . There was a pause of about five seconds, then a second pop. A bullet pierced [Sergeant Matthew] Lewis' chest. . . . The firing became rapid. Soldiers fell all around the infield. . . . Scroggins and his top officers realized they were under fire. They saw muzzle flashes. They sprinted for the woods. One of the first to reach the trees was Major Guy Lafaro.*

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> *As he ran, he noticed the shots were now much louder. Kreutzer had grabbed the CAR-15. He used it to shoot Lafaro. Major Stephen Badger, a career soldier and a father of eight, rushed to within 25 feet of the gunman. Then a bullet drove through his forehead, exiting behind his ear, leaving a hole the size of a hand. He was the last soldier shot. . . . The damage was severe. In all, 18 men aside from Badger sustained wounds . . . . Lafaro went into a coma that lasted 45 days. His mother died while he was unconscious. Castillo was paralyzed; a bullet is still lodged in his spine. Badger was dead before he made it to the hospital.*[2]

## I. Introduction

On 12 June 1996, a panel of five officers and seven enlisted members unanimously sentenced Sergeant Kreutzer to death. Without consideration of any mitigation evidence as required by the Supreme Court,[3] such a result may seem justified to supporters of the death penalty. Certainly, the evidence surrounding murderous events almost always offends human sensibilities. Retribution by killing the offender can seem to be the only appropriate response. Based on the limited evidence presented during Sergeant Kreutzer's short two-day court-martial, the members may have reached an appropriate verdict. However, the constitutional standard expressed in *Lockett v. Ohio*[4] and its progeny requires presentation of all relevant mitigation evidence. In the words of radio broadcaster, Paul Har-

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2. Todd Richissin, *Nobody Listened When a Soldier Warned of His Violent Intentions*, THE NEWS AND OBSERVER (Raleigh, N.C.), Mar. 9, 1997, at A1, LEXIS, News Group File.

3. *See generally* Buchanan v. Angelone, 522 U.S. 269 (1998) (holding that an individualized sentencing determination requires broad inquiry into all relevant mitigation evidence); Penry v. Lynaugh, 492 U.S. 302 (1989) (finding the Eighth Amendment violated where jury not properly instructed to consider all mitigating evidence); Eddings v. Oklahoma, 455 U.S. 104 (1982) (finding error where trial court refused to consider relevant mitigating evidence regarding defendant's emotional disturbance and turbulent family history); Lockett v. Ohio, 438 U.S. 586 (1978) (holding that the Eighth and Fourteenth Amendments require full consideration by capital sentencing authority of any aspect of defendant's character or record and any circumstance of the offense that defendant proffers as basis for sentence less than death); Woodson v. North Carolina, 428 U.S. 280 (1976) (finding mandatory sentencing schemes unconstitutional and requiring individualized sentencing for all capital cases).

4. *Lockett*, 438 U.S. at 604.

vey, defense counsel in capital cases must ensure that panel members know "the rest of the story."

The defense efforts in Sergeant Kreutzer's case appear to have merely scratched the surface of presenting possible mitigation evidence. The trial lasted only nineteen hours, including opening statements, evidence on the merits, recesses, closing arguments, panel instructions, deliberations on findings, presentencing evidence, sentencing arguments, and deliberations on the sentence to death. The enitre defense case, guilt and sentencing phases, took only two hours and forty-seven minutes.[5] Extremely limited extenuation and mitigation testimony reached the ears of the panel members. The defense presented testimony from only "one psychiatrist, a couple of Kreutzer's friends, a neighbor and his family."[6] Some of the witnesses testified on the merits.

Kreutzer's defense attorneys appear to have failed to fully develop evidence regarding his mental instability and efforts to get help from the Army.[7] They presented little evidence or testimony discussing results of any "multigenerational inquiry aimed at identifying any genetic predispositions and environmental influences which molded his life."[8] Yet, investigative records indicate that Sergeant Kreutzer met with Captain Darren Fong, an Army counselor and social worker, while deployed to the Sinai as part of a multinational peacekeeping force in January 1994. "On July 13, 1994, Fong filed an internal report that stated: 'Client has inappropriate coping mechanisms in dealing with his anger. This morning, client said

5. Richissin, *supra* note 2. In examining Sergeant Kreutzer's case and preparing this and other related newspaper accounts, Todd Richissin and *The News and Observer* obtained reports and court records through the Freedom of Information Act. Included among the records were internal Army psychiatric evaluations regarding Kreutzer's medical history and more than 1,800 pages of investigative and court records. Reporters also interviewed many sources inside and outside the military, including twelve hours of telephone interviews with Kreutzer himself. *Id.* According to Kreutzer's appellate attorney, the Army Court of Criminal Appeals has now sealed significant portions of the Record of Trial, particularly information pertaining to requests for a mitigation specialist. E-mail from Captain Marc Cipriano, Army Defense Appellate Division Attorney, to author (Nov. 22, 2000) [hereinafter Cipriano E-mail] (on file with author). Therefore, the Richissin article and other news accounts provide most of the factual basis for framing the issues discussed in this article. Captain Cipriano did confirm that the mitigation specialist issue would be addressed on appeal. *Id.*

6. Richissin, *supra* note 2.

7. *Id.*

8. Russel Stetler, Michael N. Burt & Jennifer Johnson, *Mitigation Introduction: Mitigation Evidence Twenty Years After Lockett*, *in* 1998 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 3 (1998).

he wanted to kill his squad and he had plans using weapons and ammunition.'"[9] Fong eventually concluded that Kreutzer was not a threat, despite records showing Kreutzer's persistent preoccupation with killing dating back to the beginning of his military service. Fong told Kreutzer that if he again felt he would lose control, he should immediately contact a counselor. Kreutzer's superiors relied on Fong's report and dropped the issue, but his subordinates used knowledge of his problems "to further harass him, calling him 'Crazy Kreutzer' and laughing that he would one day go on a shooting rampage."[10]

> In the weeks leading to the shooting, Kreutzer again began to crumble. He was disciplined in early October 1995 for losing the barrel to an M-60 machine gun. It was a serious mistake, and although the punishment amounted to little more than a notation on his record, Kreutzer took it hard, again crying to other soldiers. A few weeks later, he failed a key inspection, and his squad was about to be disciplined for missing equipment. On October 21, Kreutzer again sought help. Keeping his agreement with Fong, he tried to contact a counselor, then a chaplain. . . . In each case, he was told there was nobody available to speak with him. On October 26, he called Womack's psychiatric unit and again got no answer. Then he called a friend, Specialist Burl Mays and said he was going to shoot up Towle Stadium. . . . Mays, finding Kreutzer missing from his room early [the next] morning and a will on his desk, told his superiors about the warnings. They dismissed him.[11]

Defense counsel failed to present Fong as a witness or to explore his statements made after the shooting, such as, "Kreutzer probably has a history of psychological problems, but this was never identified by his answers or my assessment."[12] The Fong evidence, as well as significant testimonial evidence from fellow soldiers regarding Kreutzer's mental state, deserved extensive investigation and examination in relation to Kreutzer's upbringing and psychological development. Arguably, defense counsel should have presented such evidence in extenuation and

9. Richissin, *supra* note 2.
10. *Id.*
11. *Id.*
12. *Id.*

mitigation.[13] A mitigation specialist on the defense team would have assisted the lawyers in identifying, evaluating, and presenting a more complete social history. The specialist's expertise in crafting "the rest of the story" would have proven invaluable during the presentencing phase of the trial.

Sergeant Kreutzer's appellate attorneys expect to file an appeal to the Army Court of Criminal Appeals in the near future claiming that the trial attorneys "barely broached the subject of Kreutzer's mental instability at the time of the shootings."[14] The claim will likely be couched in ineffective assistance of counsel terminology and will likely criticize the military judge's failure to order funding for a mitigation specialist.[15] Both the general court-martial convening authority, Major General (MG) George A. Crocker, and the military judge, Colonel Peter E. Brownback III, denied as unnecessary pretrial funding requests by Kreutzer's military defense attorneys for a mitigation specialist.[16] Sergeant Kreutzer's trial attorneys cannot discuss their tactical decision-making process until ordered to do so by the appellate court. Thus, it remains difficult to guess why the defense presented such a limited mitigation case or to surmise whether or not a mitigation specialist would have turned the tide in favor of life over death. However, Sergeant Kreutzer's case begs the question of whether a mitigation specialist would have assisted the defense in better meeting the constitutional requirement for consideration of all mitigating factors.

The case provides an excellent factual framework and starting point from which to analyze the current legal landscape regarding use and funding of such specialists in military death penalty cases. Additionally, the case clearly identifies the undue reluctance of convening authorities and military judges to fund mitigation specialists to supplement capital defense teams. This reluctance occurs even in cases where expert assistance appears necessary based on readily available facts alone. Finally, the case highlights that effective assistance of counsel under the Sixth Amend-

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13. *See generally* Todd Richissin, *Murderer and Widow, Forgiven and Forgiving*, BALT. SUN, Feb. 28, 2000, at 1A, LEXIS, News Group File (providing a chronology of facts regarding the crime, Kreutzer's mental instability, the lack of mitigation evidence presented at trial, and the military judge's denial of mitigation assistance); Fern Shen, *Family Says Army Knew of Son's Troubles*, WASH. POST, May 31, 1996, at F03, LEXIS, News Group File (detailing the family's account, prior to trial, of Kreutzer's extensive mental problems).

14. *Widow Forgives Former Soldier Who Killed Her Husband*, AP STATE & LOCAL WIRE, Feb. 29, 2000, LEXIS, News Group File.

15. Cipriano E-mail, *supra* note 5.

16. Richissin, *supra* note 2.

ment[17] includes not only effective representation by counsel, but also adequate access to investigative resources.

Using *United States v. Kreutzer* as a springboard to identify concerns and frame the issues, this article seeks to address the need for increased access to mitigation specialists in military death penalty cases. The article concludes that evolving legal standards and an increasing awareness of the importance of mitigation specialists demand that the military justice system take affirmative steps toward making experts and investigators more readily available to defense counsel in capital cases. The article recommends a three-pronged approach to improving requests for funding and defense counsel access to mitigation specialists. The approach includes a recommended change to Rule for Courts-Martial (RCM) 703.[18] The change proposes granting capital defendants the right to ex parte hearings to demonstrate the need for expert assistance at government expense. The recommendation generally follows the federal model that grants defendants a right to ex parte requests for experts.[19] The second prong suggests that the Court of Appeals for the Armed Forces overturn *United States v. Garries*[20] and *United States v. Kaspers*[21] by finding that all capital cases involve "unusual circumstances."[22] By doing so, the military court could judicially create an absolute right to ex parte hearings regarding expert assistance following capital referrals. The third prong stresses the need for educating convening authorities, staff judge advocates, and military justice managers on the benefits of granting mitigation specialists to defense counsel early in the process of potential capital cases.

Before reaching the analysis of why defense counsel need mitigation experts and how to make them more easily accessible, Section II of the article provides a general background discussion of foundational Supreme Court cases regarding the importance of mitigation evidence in capital

17. U.S. CONST. amend. VI. In pertinent part, the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence." *Id.*

18. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703 (2000) [hereinafter MCM].

19. *See* 18 U.S.C. § 3006A(e)(1) (2000).

20. 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986) (holding ex parte showings of necessity for expert assistance at government expense only appropriate in unusual circumstances).

21. 47 M.J. 176 (1997) (finding no absolute right to ex parte hearings to demonstrate need for expert assistance at government expense).

22. *Garries*, 22 M.J. at 291; *Kaspers*, 47 M.J. at 179-80.

cases. The section also provides an overview of current rules and standards for capital cases and expert assistance requests expressed in the Rules for Courts-Martial[23] and under military case law. Section III surveys recent Court of Appeals for the Armed Forces and service court opinions that directly and indirectly affect the issue of increased access to mitigation specialists. Developments regarding ineffective assistance of counsel and funding of experts drive much of this analysis. Section IV examines evolving standards in the legal community regarding the importance of mitigation experts in death penalty cases. Section V expands on the conclusion reached in Sections II, III and IV that evolving standards require increased access to mitigation specialists. The section establishes why allowing ex parte requests will best solve the access problem and sets out two potential models for the military to follow. While concluding that a variation on the federal model provides a more workable solution than the North Carolina model, the section also introduces and recommends the three-pronged approach mentioned above.

## II. Survey of Supreme Court Case Law and Military Rules for Capital Cases and Experts

### A. Supreme Court Case Law Requiring Extensive Mitigation in Capital Cases

A complete analysis regarding the need for increasing defense access to mitigation specialists in military cases must start with an overview of Supreme Court requirements regarding presentation of mitigating factors and circumstances in capital cases.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty. . . . [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the

23. MCM, *supra* note 18, R.C.M. 703, 1004.

> individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. The conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.[24]

The Supreme Court struck down mandatory sentencing schemes in death penalty cases in *Woodson v. North Carolina*.[25] Then the Court continued its theme of ensuring sentencing authorities consider all "compassionate or mitigating factors stemming from the diverse frailties of humankind"[26] in *Lockett v. Ohio*[27] and *Eddings v. Oklahoma*.[28] In *Lockett*, the Supreme Court required for the first time full consideration of all relevant mitigation evidence in death penalty sentencing hearings. "In *Penry v. Lynaugh*,[29] Justice O'Connor crystallized the teachings of *Lockett* and *Eddings* as 'the principle that punishment should be directly related to the personal culpability of the criminal defendant,' which [can] only be assessed if life history data [is] given meaningful effect."[30] The evolving standards and "enlightened policy"[31] expressed in the *Lockett* line of cases demand that military practitioners recognize that justice and constitutional case law require full and extensive consideration of all possible mitigation evidence in capital cases.

Even while constructing many procedural bars to overturning death sentences throughout the nineties, the Supreme Court held firm to the principle that the Eighth Amendment[32] requires "individualized selection for

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24. Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976).

25. *Id.* at 304.

26. *Id.*

27. 438 U.S. 586 (1978)(holding that the Eighth and Fourteenth Amendments require full consideration by capital sentencing authority of any aspect of defendant's character or record and any circumstance of the offense that defendant proffers as basis for sentence less than death).

28. 455 U.S. 104 (1982) (finding error where trial court refused to consider relevant mitigating evidence regarding defendant's emotional disturbance and turbulent family history).

29. 492 U.S. 302 (1989) (finding the Eighth Amendment violated where jury not properly instructed to consider all mitigating evidence).

30. Stetler, Burt, & Johnson, *supra* note 8, at 2 (quoting *Penry*, 492 U.S. at 319).

31. *Id.* at 1.

32. U.S. CONST. amend. VIII. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

society's punishment of last resort."[33] In *Buchanan v. Angelone*,[34] the Supreme Court reaffirmed recently that an individualized sentencing determination necessitates a "broad inquiry into all relevant mitigating evidence."[35] This need for a broad inquiry supports increased access to mitigation specialists who can provide defense counsel with appropriate approaches to investigating and presenting sentencing evidence.

### B. Rules for Courts-Martial in Capital Cases

A review of the general rules regarding military capital cases provides appropriate background for the rest of this section's analysis. Rule for Courts-Martial 1004 governs the specialized procedures that apply in military capital cases. The rule traces its roots to the 1983 Court of Military Appeals decision in *United States v. Matthews*.[36] In *Matthews*, the court reversed the death sentence because the members were not required to specifically identify the aggravating factors upon which they based their decision to impose death.[37] While the rule-makers drafted RCM 1004 before the court issued its final opinion in *Matthews*, the procedures for capital cases were the subject of extensive litigation at the time of the drafting.[38] "The rule was drafted in recognition that, as a matter of policy, procedures for the sentence determination in capital cases should be revised, regard-

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33. Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, INDIGENT DEFENSE, July/Aug. 1999, *available at* http://www.nlada.org/DMS/Documents/998934720.005.

34. 522 U.S. 269 (1998) (holding that an individualized sentencing determination requires broad inquiry into all relevant extenuating and mitigating circumstances).

35. Stetler, *supra* note 33 (quoting *Buchanan*, 522 U.S. at 276).

36. 16 M.J. 354 (C.M.A. 1983) (reversing death sentence because members not specifically required to find aggravating circumstances). *See generally* Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, FED. LAW., June 1998, at 38. After giving an overview of the military's death penalty scheme, Sullivan provides an excellent examination of contemporary legal debates regarding capital punishment in the military. Issues addressed in the article include: commanding officers' selection of court-martial members, variable court-martial panel size, absence of meaningful Habeas review, and racial disparity. *Id.*

37. *Matthews*, 16 M.J. at 379.

38. MCM, *supra* note 18, R.C.M. 1004 analysis, app. 21, at A21-69.

less of the outcome of such litigation, in order to better protect the rights of service members."[39]

The court issued the *Matthews* decision while RCM 1004 circulated for public comment. The court's holding invalidated the procedures then in effect and necessitated revision. "However, *Matthews* did not require substantive revision of the proposed RCM 1004," and President Reagan promulgated the new rule and incorporated it in the 1984 *Manual for Courts-Martial*.[40]

*Matthews* firmly established that military death penalty cases must comply with the Supreme Court's Eighth Amendment precedents. The court held that Article 55 of the Uniform Code of Military Justice (UCMJ)[41] provides comparable protection against cruel and unusual punishments. Specifically, the court stated that, "in enacting Article 55, Congress 'intended to grant protection covering even wider limits' than 'that afforded by the Eighth Amendment.'"[42] The statutory and constitutional protections for service members against cruel and unusual punishments led the court to conclude that all Supreme Court requirements for civilian capital cases apply in courts-martial.[43] Thus, *Lockett* and its progeny of cases through *Buchanan*, which require full and extensive consideration of

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39. *Id.* at A21-70.

40. *Id.*

41. UCMJ art. 55 (2000). Article 55 states:

> Punishment by flogging, or branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

*Id.*

42. *Matthews*, 16 M.J. at 368 (quoting United States v. Wappler, 9 C.M.R. 23, 26 (C.M.A. 1953)).

43. *Id.* at 368-69.

extenuating and mitigating circumstances, apply to military death penalty cases.[44]

Rule for Courts-Martial 1004 codifies a defendant's right to an unrestricted opportunity to present mitigating and extenuating evidence by establishing specialized procedures for reaching sentences in capital cases.[45] In *United States v. Simoy*,[46] the Court of Appeals for the Armed Forces discussed and affirmed the four specific "gates" through which a court-martial panel must pass to arrive at a bona fide death sentence.[47]

First, the panel must unanimously find the accused guilty of a death-eligible offense.[48] Currently, there are fifteen offenses punishable by death under the UCMJ. Many of the crimes, however, such as desertion, disobeying a superior commissioned officer, and spying, only apply in time of war. In the case of murder, the members must agree unanimously that the accused committed premeditated murder or unlawfully killed another human being during the commission of certain offenses (felony murder).[49] Although military practice does not follow most civilian jurisdictions in mandating twelve jurors in capital cases,[50] the rules do require

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44. *See generally* MCM, *supra* note 18, R.C.M. 1004 analysis, app. 21, at A21-70.

> The Court of Military Appeals listed several requirements for adjudication of the death penalty, based on Supreme Court decisions: (1) a separate sentencing procedure must follow the finding of guilt of a potential capital offense; (2) specific aggravating circumstances must be identified to the sentencing authority; (3) particular aggravating circumstances used as a basis for imposing the death sentence; (4) the defendant must have an unrestricted opportunity to present mitigating and extenuating evidence; and (5) mandatory appellate review must be required to consider the propriety of the sentence as to the individual offense and individual defendant and to compare the sentence to similar cases within the jurisdiction.

*Id.* (summarizing *Matthews*, 16 M.J. at 369-77).

45. *Id.* R.C.M. 1004 (a)(3) ("The accused shall be given broad latitude to present evidence in extenuation and mitigation.").

46. 50 M.J. 1 (1998).

47. *Id.* at 2. *See generally* Major Paul H. Turney, *New Developments in Capital Litigation: Four Cases Highlight the Fundamentals*, ARMY LAW., May 2000, at 63.

48. MCM, *supra* note 18, R.C.M. 1004(a)(2).

49. UCMJ art. 118. The felony murder offenses, which the accused must have been engaged in the perpetration of or attempted perpetration of, include: burglary, sodomy, rape, robbery, or aggravated arson. *Id.*

50. MCM, *supra* note 18, R.C.M. (b) (requiring a minimum of five panel members at all general courts-martial).

unanimity as to guilt as the first prerequisite to a death sentence.[51] The remaining gates occur during sentencing deliberations.[52]

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51. *Id.* R.C.M. 921 (c)(2)(A). Except in capital cases, a finding of guilty results if at least two-thirds of the court-martial members vote for guilt. *Id.* R.C.M. 921(c)(2)(B).

All seven inmates presently on death row at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, were convicted of murder under Article 118, UCMJ. Inmates convicted by Army courts-martial include: Dwight J. Loving, Ronald Gray, William Kreutzer, and James T. Murphy. Loving, Gray, and Murphy are African-American; Kreutzer is Caucasian. Murphy remains on death row by choice. The Court of Appeals for the Armed Forces set aside his sentence and remanded the case to the Army Court of Criminal Appeals. He awaits re-sentencing or a reassessed sentence by the Army Court. Inmates convicted by Marine courts-martial include: Kenneth Parker, Wade L. Walker, and Jessie Quintanilla. Parker and Walker are African-American; Quintanilla is Asian. *See* Death Penalty Information Center, U.S. Military, *at* http://www.deathpenaltyinfo.org/military.html (last visited Nov. 11, 2000) (updating the status of military death row inmates).

Since enactment of the UCMJ in 1950, the military services have executed thirteen servicemen. All were found guilty of murder, murder and rape, or attempted murder and rape. The last execution of a member of the armed forces took place on 13 April 1961. Information Paper, subject: Military Capital Cases (11 Apr. 1999), *in* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 47TH GRADUATE COURSE MILITARY JUSTICE MANAGEMENT ELECTIVE COURSE OUTLINE (1999).

> The history of military capital punishment reveals that the last execution of a marine occurred in 1817. The Navy's last execution occurred in 1847. From 1948 (the year the Air Force came into existence) to date, 3 Air Force personnel have been executed. Since 1916, the Army has executed 191 soldiers. During World War I, 35 soldiers were executed. During World War II, 146 soldiers were executed. Since 1950, the year the UCMJ was implemented, there have been 13 executions, 10 soldiers and 3 airmen. All 13 were executed by hanging. Six were executed at the Federal Prison at Lansing, Michigan. Four were executed at the [U.S. Disciplinary Barracks], Fort Leavenworth, Kansas. Two were executed in Guam and one in Japan. Under the UCMJ for those actually executed, the average time from trial to execution was about four years. The last DOD person executed was Army PFC John A. Bennett, who was hung on 13 April 1961 for rape and the attempted premeditated murder of an eleven-year-old girl. The post-1950 death penalty offenses are as follows:
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> | | | |
> |---|---|---|
> | 1950-1 | 1-Murder | 1-Air Force |
> | 1954-3 | 2-Murder & Rape/1-Murder | 2-Air Force/1-Army |
> | 1955-3 | 3-Murder | 3-Army |
> | 1957-3 | 1-Murder & Rape/2-Murder | 3-Army |
> | 1958-1 | 1-Murder | 1-Army |
> | 1959-1 | 1-Murder & Rape/1-Murder | 1-Army |
> | 1961-1 | 1-Rape & Attempted Murder | 1-Army |

*Id.*

Second, following the sentencing hearing in a death case, panel members must unanimously agree that the government has proven at least one specified aggravating factor beyond a reasonable doubt.[53] The need for this gate and the list of specific aggravating factors in RCM 1004(c) came to light during appellate litigation of the *Matthews* case.[54] Third, the members must determine by unanimous vote whether or not the aggravating factors and aggravating circumstances substantially outweigh any extenuating and mitigating circumstances.[55] The necessity for increased defense access to mitigation specialists revolves around this balancing test. Fairness under our adversarial system requires competent, thorough, and complete presentation of all mitigating evidence to counter the government's constitutionally based responsibility to extensively present evidence in aggravation. Prosecutors must focus extensive time, energy, and resources developing and offering aggravation evidence. Their efforts ensure that cases not only pass through the second gate, but also tip the balance substantially to meet the burden at the third gate.

Finally, even if the members vote unanimously at the first three gates, they must still vote again on an appropriate sentence. No requirement exists for members to vote for death, even though they voted affirmatively at the first three gates. Hence, the fourth gate mandates a final unanimous agreement that the accused should face the death penalty.[56]

### C. Rules for Courts-Martial and Recent Cases Controlling Expert Assistance Requests

Before moving from the general rules governing death penalty trials to recent cases shaping capital litigation in the military, one must examine the current legal landscape regarding expert assistance. Any discussion of the relevance and importance of mitigation specialists must start with a general examination of how to request funding to acquire their services.

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52. All military courts-martial follow a bifurcated procedure, separating the merits phase from the sentencing phase of the trial. *See id.* R.C.M. 1004(a)(1).

53. *Id.* R.C.M. 1004 (b)(4)(A), 1004 (c).

54. United States v. Matthews, 16 M.J. 354, 379 (C.M.A. 1983).

55. MCM, *supra* note 18, R.C.M. 1004 (b)(4)(C). Rule 1004 (c) lists the specific aggravating factors for capital cases. *Id.* R.C.M. 1004(c)(1)-(8). The balancing test at the third gate, however, also includes any aggravating circumstances directly relating to or resulting from the offenses. The rule governing the admissibility of aggravating circumstances applies in all courts-martial. *Id.* R.C.M. 1001(b)(4).

56. *Id.* R.C.M. 1004(b)(7).

Although this overview addresses the status of a defendant's right to make ex parte requests for such assistance, the analysis in Section V covers the proposal linking ex parte hearings to expanded access to mitigation specialists.

The Sixth Amendment grants an accused the right to compulsory process ensuring the presence of witnesses. In military practice, the right to supplement the defense team with expert witnesses and assistance is based on Article 46, UCMJ.[57] The article provides equal access to witnesses for all parties involved in a court-martial. Specific rights regarding expert witnesses, however, began to crystallize when the Supreme Court decided *Ake v. Oklahoma*.[58] By the time the Court decided *Ake*, over forty states and the federal government had already granted defendants entitlement to expert psychiatric assistance.[59] Then in *Ake*, the Court "established the principle that the Due Process Clause of the Constitution includes a right to supplement the defense team with expert assistance when such assistance is necessary to a fair trial."[60]

In 1986, the Court of Military Appeals (now called the Court of Appeals for the Armed Forces) followed the Supreme Court's lead. *United States v. Mustafa*[61] and *United States v. Garries*[62] firmly establish the right to expert consultants and investigators in military cases. *Garries*, however, makes clear that defense counsel carry the burden of demonstrating why assistance is "necessary" and why they cannot prepare and present the case themselves.[63]

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57. UCMJ art. 46 (2000). "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." *Id.*

58. 470 U.S. 68 (1985) (finding an indigent criminal defendant entitled to expert assistance at government expense when sanity at time of offense was seriously in question).

59. *Id.* at 79.

60. Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143, 144 (1996).

61. 22 M.J. 165 (C.M.A. 1986), *cert. denied*, 479 U.S. 953 (1986) (holding an accused is entitled to investigative or other expert assistance when necessary to prepare an adequate defense).

62. 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).

63. *Garries*, 22 M.J. at 290-91. *See also* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 49TH OFFICER'S GRADUATE COURSE CRIMINAL LAW DESKBOOK D-23 to 26 (Fall 2000) [hereinafter CRIMINAL LAW DESKBOOK].

Rule for Courts-Martial 703(d) controls the process for requesting expert witnesses.[64] Although RCM 703(d) refers only to expert *witness* requests, the Court of Appeals for the Armed Forces also uses the rule as a basis when defining standards for expert *assistance* requests. Before requesting funding through the military judge, counsel must submit a request to the relevant general court-martial convening authority. The convening authority is the only official authorized to grant funding for expert assistance prior to referral of the case to a court-martial. After referral, the military judge takes control of the case. The judge may revisit any request for funding on the record, but defense counsel must once again demonstrate the necessity for assistance.[65]

*Garries* and RCM 703(d) do not provide strict guidelines on how to meet the required showing of necessity. In *United States v. Gonzalez*,[66] however, the military court attempted to "fill the void created by *Garries*, by favorably citing a three-part analysis laid out by the Navy-Marine Court

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64. MCM, *supra* note 18, R.C.M. 703(d) states:

> (d) *Employment of expert witnesses*. When a party considers the employment at Government expense of an expert necessary, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) [regarding standard fees and mileage for standard civilian witnesses] of this rule.

*Id.*

65. *See id*.

66. 39 M.J. 459 (1994) (adopting a three-pronged test for showing why expert assistance is necessary, what expert assistance would accomplish, and why defense counsel is unable to gather and present same evidence).

of Military Review in *United States v. Allen*."[67] *Gonzalez* provides a starting point for defense counsel to craft their requests.

The apparent key to obtaining assistance is a plausible showing that the expert can supply information or services that counsel cannot get or accomplish on his own. The more detail counsel provides in the request, the greater the chances of success.[68] *United States v. Short*[69] demonstrates that only strict adherence to the standard will result in a grant of funding. Because the case law encourages such a detailed explanation, the government tends to insist on a heightened standard for defense counsel compliance with the rule. This strict compliance provides a significant advantage to the government in the reciprocal discovery process.

As discussed in Section V, ex parte requests for assistance might level the playing field, particularly in death penalty cases. However, no absolute right to an ex parte hearing to demonstrate necessity for assistance exists in military practice. In *Garries*, the Court of Military Appeals held that the right to request expert assistance at an ex parte hearing under the federal code, does not apply to the military.[70] The court recognized "inherent authority in the military judge to permit such a procedure in the *unusual circumstance* where it is necessary to insure a fair trial."[71] However, the next sentence in the opinion states that "[u]se of an *ex parte* hearing to obtain expert services would rarely be appropriate in the military context because funding must be provided by the convening authority and such a procedure would deprive the Government of the opportunity to consider and arrange alternatives for the requested services."[72]

The court then refused to accept the generalization that a capital referral necessarily justifies the expert assistance of an investigator.[73] By

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67. Gunn, *supra* note 60, at 148 (quoting *Gonzalez*, 39 M.J. at 461 (citing United States v. Allen, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991)).

68. CRIMINAL LAW DESKBOOK, *supra* note 63, at D-23 to 24. The guidance provided to practitioners by the Army Judge Advocate School's Criminal Law Department suggests the need for a very detailed showing of necessity for a request to pass muster under current case law. *Id.*

69. 50 M.J. 370 (1999) (finding the defense failed to make an adequate showing of necessity when it refused to talk to government expert, did not seek help from more experienced counsel, and successfully elicited needed testimony during cross-examination).

70. United States v. Garries, 22 M.J. 288, 291 (C.M.A. 1988).

71. *Id.* (emphasis added).

72. *Id.*

73. *Id.*

implication, the case stands for the proposition that a capital referral alone does not constitute an unusual circumstance. Most recently, in *United States v. Kaspers*,[74] the court generally affirmed its holding in *Garries*, while acknowledging that the military rule "may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy."[75] Both *Garries* and *Kaspers* address the ex parte question in the context of murder trials. However, neither case specifically examines the issue of the right to an ex parte hearing when requesting a mitigation specialist in all capital cases.

## III. Analysis of Recent Military Cases Regarding the Need for Mitigation Specialists

A discussion of recent military case law regarding the necessity for mitigation specialists in death penalty cases starts with an examination of ineffective assistance of counsel standards in capital courts-martial. The Supreme Court recognizes that the Sixth Amendment right to counsel requirement mandates provision of adequate resources to present an effective defense.[76] Surveying how military courts address the issue of funding for mitigation specialists then dovetails into the discussion of ineffective assistance of counsel in each case.

### A. *United States v. Loving*

The Supreme Court's ruling in *United States v. Loving*[77] validates the current procedural scheme in the military for arriving at a death sentence in a court-martial. In 1988, an eight-member general court-martial at Fort Hood, Texas, convicted Private Dwight Loving of premeditated murder and felony murder under Article 118, UCMJ. Private Loving murdered two taxicab drivers from Killeen, Texas, and he attempted to murder a third. Authorities apprehended him the following day, and he confessed to the killings.[78] Although *Loving* focuses on the President's authority to promulgate the aggravating factors listed in RCM 1004, the Supreme

74. 47 M.J. 176 (1997).

75. *Id.* at 180.

76. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

77. 517 U.S. 748 (1996) (validating President's authority, under separation of powers doctrine, to prescribe aggravating factors required to permit courts-martial to adjudge death sentences).

78. *Id.* at 751.

Court also affirmed the death sentence by a unanimous vote, without reaching any of the other challenges to the constitutionality of military jurisdiction or procedure in capital cases.[79]

This article focuses primarily on the Court of Appeals for the Armed Forces opinion in *Loving*[80] regarding ineffective assistance of counsel and mitigation specialists. In one respect, the case illustrates how the Supreme Court's emphasis on ensuring reliability in death cases usually leads to ineffective assistance of counsel claims on appeal. The examination of attorneys' actions, particularly in successful appeals, invariably focuses on inadequate presentation of mitigation evidence. It is "the most common basis for claims of ineffective assistance of counsel in death penalty cases across the country."[81]

In the civilian sector, the problem most often results from either a failure to investigate and discover readily available evidence or an improper decision to refrain from presenting mitigating facts.[82] The military cases discussed in this section indicate similar scrutiny by the Court of Appeals for the Armed Forces regarding the level of investigation expected of counsel in capital cases. Interestingly, the court has not used its interpretive powers to encourage convening authorities or military judges to liberally grant funds for mitigation specialists to assist inexperienced and under-resourced defense counsel.

In *Loving*, an important facet of the ineffectiveness claim centers on defense counsel's failure to investigate and present evidence regarding voluntary intoxication. The court accepted counsel's position that he chose not to present the evidence for strategic reasons. The decision to

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79. *Cf. id.* at 774-75. Justice Steven's concurrence, which Justices Souter, Ginsburg and Breyer joined, questioned whether a "service connection" requirement for jurisdiction as delineated in *Solorio v. United States*, 483 U.S. 435 (1987), should apply to military capital cases. *Id.* Following *Loving*, the Court of Appeals for the Armed Forces in *United States v. Curtis*, 44 M.J. 106 (1996), and the Air Force Court of Criminal Appeals in *United States v. Simoy*, 46 M.J. 592 (A.F. Ct. Crim App. 1996), affirmatively detailed facts establishing service connection.

80. United States v. Loving, 41 M.J. 213 (1994).

81. Stetler, Burt, & Johnson, *supra* note 8, at 4.

82. Teresa L. Norris, Center for Capital Litigation, Summaries of All Published Successful Ineffective Assistance of Counsel Claims Since *Strickland v. Washington* (Apr. 9, 1997) (unpublished compilation of case summaries, on file with author). Ms. Norris summarizes sixty-five death sentences overturned on appeal between 1985 and 1997 for ineffective assistance of counsel during the penalty phase. Failure to investigate and present mitigation evidence caused most of the deficiencies.

leave out intoxication then led the defense team to cut its mitigation investigation short.[83] *Loving* held that the appellant did not satisfy the first prong of *Strickland v. Washington*—demonstrating that counsel's performance was deficient.[84] The opinion shows, however, that the Court of Appeals for the Armed Forces considers closely all questions regarding presentation of evidence in the sentencing phase of death penalty trials.[85] Clearly, a mitigation specialist could have provided Private Loving the needed expertise and resources to discover the witnesses missed by counsel. An expert could also have assisted the defense team to find the best approach for presenting mitigating circumstances at trial.

*Loving* presents a different scenario than *Kreutzer* and some of the other cases discussed in this article. The appeal tied its ineffectiveness claim to trial defense counsel's failure to request funds for a mitigation specialist or "present a cohesive, comprehensible background, social, medical, and environmental history."[86] Other cases couch their claims of ineffectiveness in the inability of counsel to investigate because of the denial of funding. In any case, the *Loving* court ruled specifically that: "While use of an analysis prepared by an independent mitigation expert is often useful, we decline to hold that such an expert is required. What is required is a reasonable investigation and competent presentation of mitigation evidence."[87]

This article does not question the factual merits of the court's holding that counsel were effective and conducted a reasonable investigation and presentation. The *Loving* court's unequivocal language, however, tends to minimize the increasingly recognized importance of mitigation specialists. Additionally, at the trial court level, the wording arms trial counsel, commanders, and judges with powerful ammunition to reject without consideration defense requests for assistance. In *Kreutzer*, for example, the

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83. *Loving*, 41 M.J. at 242.

84. *Id.* (citing Strickland v. Washington, 466 U.S. 668 (1984)). *Strickland* held that the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the result of trial is not reliable. The Supreme Court set out a two-pronged test for reversing a conviction or setting aside a death sentence. First, the defendant must show that counsel's performance was deficient. Second, the deficient performance must have so prejudiced the defense as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 669.

85. The *Loving* decision is also interesting in light of the *Curtis* case discussed later. United States v. Curtis, 46 M.J. 129 (1997) (finding counsel ineffective for not presenting evidence regarding intoxication).

86. *Loving*, 41 M.J. at 249.

87. *Id.* at 250.

convening authority relied specifically on the language in *Loving* to summarily deny the defense request for a mitigation expert.[88] *Loving* represents the current state of the law in military jurisdictions. The remainder of this article demonstrates that the case may not represent the evolving standards in the legal community at large.

### B. *United States v. Gray*

*United States v. Gray*[89] is the most recent death case decided by the Court of Appeals for the Armed Forces. Unfortunately, the court in *Gray* not only appears out of step with evolving standards in the legal community, but also with its own leanings in *United States v. Curtis*,[90] *United States v. Murphy*,[91] and *United States v. Simoy*.[92] The court decided all three cases after *Loving*, and it appeared to embrace evolving standards regarding effective representation and presentation of mitigation evidence during capital sentencing hearings.

In *Gray*, the court rejected arguments regarding the failure to provide Specialist Gray with counsel qualified according to American Bar Associ-

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88. Memorandum, Commander, 82d Airborne Division, Fort Bragg, North Carolina, subject: Defense Request for Employment of Mitigation Specialist—*United States v. SGT William J. Kreutzer, Jr.*, para. 4 (22 Mar. 1996) (on file with author). The memorandum states in paragraph 3:

> a. The defense has failed to establish the necessity of hiring a mitigation specialist. The Court of Appeals for the Armed Forces has held that while a mitigation specialist is often useful, such an expert is not required. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses. *United States v. Loving*, 41 M.J. 213, 250 (1994).
>
> b. Counsel for the accused have the responsibility of presenting mitigation evidence . . . . This evidence can be gathered by defense counsel by interviewing the accused's family, friends, teachers, counselors, pastors, and other acquaintances, as well as reviewing records and other written documents pertaining to the accused. It is reasonable for defense counsel to travel beyond Fort Bragg in order to accomplish this task.

*Id.*

89. 51 M.J. 1 (1999).
90. 46 M.J. 129 (1997) (*Curtis II*).
91. 50 M.J. 4 (1998).
92. 50 M.J. 1 (1998).

ation Guidelines.[93] Although this holding was hardly novel, the court missed an opportunity to expand its emphasis in *Curtis*, *Murphy*, and *Simoy* on ensuring that the military keeps up with evolving legal standards. The *Gray* court declined to exercise its supervisory powers to establish qualification standards for counsel in capital cases. Instead, the judges elected to follow the general guidance for effectiveness of counsel expressed by the Supreme Court in *Strickland v. Washington.*[94] The *Gray* court also minimized the effect of failing to present evidence of intoxication during the presentencing hearing.[95] This position seemingly contradicts the apparent leanings in *Curtis*, in which the court emphasized the importance of presenting all mitigation evidence in death cases to ensure reliability.[96]

In 1987, Specialist Gray raped, sodomized, and murdered another soldier's wife and a female civilian taxicab driver. He also raped and attempted to murder a female soldier. The panel found him guilty of two specifications of premeditated murder and one specification of attempted premeditated murder, three specifications of rape, two specifications of burglary, and two specifications of forcible sodomy. In North Carolina state court, he pled guilty to the murder and rape of two additional young women and received two life sentences. The court-martial sentenced him to death.[97]

The Court of Appeals for the Armed Forces considered 101 distinct issues in *Gray.* The key issue for this discussion is Gray's contention that his trial defense counsel failed to investigate the mitigating circumstances

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93. *Gray*, 51 M.J. at 54.

94. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)). *See also* United States v. Gray, 32 M.J. 730 (A.C.M.R. 1991). The Army court's opinion is particularly instructive regarding adoption of the ABA Guidelines:

> Finally, we emphasize that our focus in Army death penalty cases will be on the quality of representation provided, rather than the qualifications of counsel as specified in the ABA Guidelines. Just as soldiers who are asked to lay down their lives in battle deserve the very best training, weapons, and support, those facing the death penalty deserve no less than the very best quality of representation available under our legal system.

*Id.* at 732.

95. *Gray*, 51 M.J. at 18-19.

96. United States v. Curtis, 46 M.J. 129, 129-31 (1997) (*Curtis II*).

97. *Gray*, 51 M.J. at 11.

of his traumatic family, social, and medical histories. Gray also pointed to his counsel's failure to investigate and present evidence regarding Gray's intoxication at the time of the offenses. In ruling that counsel represented Gray effectively, the court stated, "The problem with appellant's argument is that it equates failure to discover certain facts with failure to conduct a proper investigation."[98] Then to counter the argument that counsel did not find all available mitigating evidence, the court pointed to the "substantial mitigating evidence presented in this case from appellant's trial psychiatric experts and his family."[99] Rather than balancing whether a reasonable probability existed that the additional evidence might have changed the result, the court seemed to limit its analysis to whether counsel presented an adequate amount of evidence.

*Gray* appears to signal a return by the military court to the view that "[d]eath is not different,"[100] when scrutinizing the reliability of a capital sentence. The majority argued that "even the best criminal defense attorneys would not defend a particular client in the same way."[101] Later in the opinion, the court found that the military judge erred by not allowing as mitigation evidence a videotape of a network television program dealing with the poor living conditions and social dynamics in Gray's neighborhood. The court held, however, that despite the established principle in *Lockett* that a capital defendant has broad latitude in presenting mitigating evidence, the error was harmless beyond any doubt.[102] Once again, the opinion seems to lean back toward a pre-*Curtis* view of what constitutes an effective presentation of mitigation evidence. The military judge's denial of requests for assistance in *Gray* did *not* include a specific request for a mitigation specialist. However, the tenor of the opinion regarding investigators and psychiatrists indicates a reluctance to provide any assistance to defense counsel absent an extensive showing of necessity on the record.[103]

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98. *Id.* at 18.

99. *Id.*

100. *Curtis II*, 46 M.J. at 130 (quoting United States v. Curtis, 44 M.J. 106, 167 n.1 (1996) (*Curtis I*)).

101. *Gray*, 51 M.J. at 19 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, N.Y.U. L. REV. 299, 343 (1983)).

102. *Id.* at 39.

103. *Id.*

C. *United States v. Curtis, Simoy,* and *Murphy*

In *Curtis*, *Simoy*, and *Murphy*, the Court of Appeals for the Armed Forces indicated a desire to bring the military justice system in line with evolving legal standards. The cases seemed to raise the bar with regard to effective assistance of counsel and presentation of mitigation evidence in capital cases. Although the pendulum appears to have swung back in *Gray*, the consistent 3-2 split between the judges in these cases shows at least a persistent concern that the military justice system carefully scrutinizes its procedures in capital cases.

In April 1987, Lance Corporal Curtis murdered an officer and his wife at Camp Lejeune, North Carolina. In June 1996, the Court of Appeals for the Armed Forces affirmed Curtis's conviction.[104] Then the court reversed itself in June 1997, setting aside the death sentence based on ineffective assistance of counsel.[105] Judge Cox represented the "swing" vote in the reversal. In a concurring opinion, he indicated his evolving perspective regarding capital cases in the military. He expressly rejected his initial inclination to view only the circumstances of the crimes, when concluding that no jury would elect to impose anything other than a sentence of death. Then he stated that "time has marched on" since his first consideration of the case in 1991.[106] His opinion expresses a newfound view that "there was no justification for failing to use the evidence of appellant's intoxication during sentencing."[107] He specifically attributes the failure to inexperience. Judge Cox contends:

> The sentencing hearing may have been adequate for an absence without leave case, but it was woefully lacking and totally unacceptable in a capital murder case. . . . In my opinion, appellant's sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a death penalty case or where to look for the type of mitigating evidence that would convince at least one court member that appellant should not be executed.[108]

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104. *Curtis I*, 44 M.J. at 161.

105. *Curtis II*, 46 M.J. at 130.

106. *Id.* 1997 CAAF LEXIS 38, at *5 (*Editor's Note: The LEXIS electronic database is cited because the Military Justice Reporter excludes inexplicably Chief Justice Cox's concurring opinion at 46 M.J. 130*).

107. *Id.* at *9.

108. *Id.* at *7-8.

Judge Cox recognized that an adequate capital sentencing case includes presentation of all possible mitigating evidence because of the four unanimous votes required to impose death. To save the client's life, defense counsel must only find enough mitigation to influence one vote at one gate.[109] Judge Cox's opinion lends credence to the argument that convening authorities and military judges should liberally grant requests for mitigation specialists to add capital experience to the defense team.

*Simoy* was another case that recognized evolving legal standards. Although the case was ultimately overturned on an instructional error,[110] the appellate courts closely examined ineffective assistance of counsel[111] and the judge's limitation of mitigation evidence at sentencing.[112]

Airman Simoy planned a robbery. During the robbery, Simoy's brother beat to death a security policeman. Simoy encouraged his brother to murder the policeman and to stab a potential witness.[113] The Air Force Court of Criminal Appeals detailed that the entire defense submission on sentencing comprised seven pages of the record. No live witnesses testified for the defense, and counsel only submitted two documents into evidence.[114] In concurring opinions at the Court of Appeals for the Armed Forces, three of the five judges agreed that the trial judge erred by limiting the defendant's broad right to present mitigation evidence during sentencing. The trial judge also excluded evidence that the accused's civilian brother would receive a mandatory life sentence in state court.[115] Consistent with the court's heightened scrutiny articulated in *Curtis*, the *Simoy* court focused on ineffective assistance during sentencing, and it attempted to allow broad latitude regarding mitigating evidence.[116]

In *Murphy*, much like *Curtis*, the Court of Appeals for the Armed Forces held that the "appellant did not get a full and fair sentencing hearing."[117] In remanding the case, the court pointed to trial defense counsel's failure to explore mental health evidence beyond requesting a

109. *Id.* at *5-6.
110. United States v. Simoy, 50 M.J. 1, 2 (1998).
111. United States v. Simoy, 46 M.J. 592, 602-07 (A.F. Ct. Crim. App. 1996).
112. *Simoy*, 50 M.J. at 3.
113. *Simoy*, 46 M.J. at 599-601.
114. *Id.* at 632.
115. *Simoy*, 50 M.J. at 3.
116. *See id.*
117. United States v. Murphy, 50 M.J. 4, 15 (1998).

sanity board.[118] The Judge Advocate General of the Army granted a funding request to conduct a post-trial social history five years after Murphy's conviction for murdering his former wife, five-year old stepson, and biological infant son. The investigation produced new factual evidence regarding a personality disorder and other psychological dysfunction.[119]

The 3-2 decision in *Murphy* lists "key ingredients" to a reliable capital case: "competent counsel; full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain services of experts; and fair and impartial judges and juries."[120] Although Judge Sullivan's dissent perhaps foreshadows an eventual return to a relatively low standard in *Gray*, he points out that the majority in *Murphy* and *Curtis* posit "that military lawyers are, in effect, unqualified to act in capital cases."[121] The majority in *Murphy* states:

> The Army Court of Military Review blessed this sentencing effort by characterizing it as "trial defense counsel's tactical judgment." In some cases, this effort might well satisfy the *Strickland* standard for adequate representation. What follows in this opinion, however, demonstrates that a capital case—or at least this capital case—is not "ordinary," and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death.[122]

On remand from the Court of Appeals for the Armed Forces, the Army Court of Criminal Appeals returned the *Murphy* case to The Judge Advocate General of the Army. Further, the Army court ordered the case referred to a general court-martial for a *Dubay*[123] hearing.[124] The hearing was required, the court reasoned, in light of the information gained post-trial by a mitigation specialist who was funded pursuant to the appellate court's order. The Army court concluded it could not effectively use its fact-finding powers to determine "whether '[t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for

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118. *Id.* at 16.
119. *Id.* at 13-14.
120. *Id.*
121. *Id.* at 28-29.
122. *Id.* at 13.
123. United States v. Dubay, 37 C.M.A. 411 (1967).
124. United States v. Murphy, 2001 CCA LEXIS 286, at *3 (Nov. 20, 2001).

the accused.'"[125] The rationale for ordering the *Dubay* evidentiary hearing included the need to test this "barrage" of post-trial information "'in the crucible of an adversarial proceeding.'"[126] The court's emphasis on weighing mitigation evidence in light of cross-examination and contrary testimony by government witnesses shows the importance of handling evidence provided by mitigation specialists at the trial court level. If access to such specialists is delayed until post-trial, then convening authorities and military judges are, in essence, forcing appellate courts to send death penalty cases back to courts-martial for further evidentiary hearings.

Like *Curtis*, *Murphy* illustrates that a trained mitigation specialist supplementing the defense team at the trial level can greatly assist in uncovering and organizing the presentation of all needed and relevant evidence. If nothing else, the cases show the difficulty that inexperienced military counsel face in preparing and presenting adequate capital sentencing cases. Liberally granting requests for expert assistance in death cases will help solve the unavoidable problem of inexperienced military counsel. It will also go a long way toward validating the fairness and legitimacy of the military's capital sentencing scheme.

### D. Specific Funding Requests at the Appellate Level

Unfortunately, capital defendants appear to have more access to funding for mitigation specialists and other experts once convicted than in preparation for trial. On 15 December 2000, nearly six years after his trial, Sergeant Kreutzer finally obtained funding for a mitigation specialist.[127] The Army Court of Criminal Appeals granted the request for expert assistance to help appellate defense counsel "conduct an extensive social history investigation and mitigation investigation."[128] As discussed in the Introduction, Sergeant Kreutzer intends to argue that the military judge erred by not granting the request for funding back in 1996. Thus, his right to effective assistance of counsel and presentation of a complete case in extenuation and mitigation was effectively denied at the trial level.[129] The integrity of the military's capital litigation scheme and constitutional standards call for adequate resources to present a complete defense at trial.

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125. *Id*. at *18-19 (quoting *Murphy*, 50 M.J. at 15 (citing R.C.M. 1210(f)(2)(C))).

126. *Id.* at *20 (quoting *Murphy*, 50 M.J. at 15).

127. United States v. Kreutzer, No. 9601044 (Army Ct. Crim. App. Dec. 15, 2000) (unpublished).

128. *Id.*

129. *See supra* notes 5-16 and accompanying text.

Sergeant Kreutzer's case is not the first case to demonstrate the reluctance of lower courts and convening authorities to grant funding for needed expert assistance in capital cases.

In 1990, the Court of Military Appeals ordered the Judge Advocate General of the Navy to provide $15,000 to appellate defense counsel in *Curtis* in response to requests for expert assistance.[130] The Judge Advocate General of the Army later unilaterally granted funding for expert assistance on appeal in *Loving* and *Murphy.*[131] This appeared to signal recognition, at least in the Army and within the judiciary, of an increased need for specialists to assist military counsel in death cases. In *United States v. Thomas*,[132] however, the Navy-Marine Corps Court of Military Review quashed any trend toward liberally granting funding themselves or encouraging lower courts to grant funding.

*In Thomas*, the Navy court rejected an expert assistance request for funding of a psychosocial background investigation. On appeal, Sergeant Thomas requested the expert to help his appellate attorneys evaluate the effectiveness of his trial attorneys' unsuccessful presentation of mitigation evidence. Trial defense counsel conducted no psychosocial background investigation.[133] The Navy court concluded that counsel conducted an extensive mitigation case at trial and found no showing of necessity as required by *Garries.*[134]

> To require psychosocial background investigations based on mere conjecture would be tantamount to a judicial license for a

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130. United States v. Curtis, 31 M.J. 395 (C.M.A. 1990) (interlocutory order).

131. United States v. Gray, 51 M.J. 1, 21-22 (1999). "In 1992, without a court order, the Judge Advocate General of the Army made funding available to two other death-row inmates whose cases were on appeal." *Id.* at 21. The court was referring to the *Loving* and *Murphy* cases. *Id.* at 22. The *Murphy* opinion mentions specifically such funding. United States v. Murphy, 50 M.J. 4, 13-14 (1998). The *Loving* opinion, however, does not mention expert funding by the Judge Advocate General of the Army. Rather, the opinion only indicates that funding for psychiatric assistance was refused at the trial level. United States v. Loving, 41 M.J. 213, 240 (1994).

132. 33 M.J. 644 (N.M.C.M.R 1991). Sergeant Thomas murdered his wife in 1987. In 1996, the Court of Appeals for the Armed Forces set aside his death sentence due to an instructional error by the military judge. The judge allowed members to vote on death before voting on aggravating factors and striking the balance between aggravation and mitigation. United States v. Thomas, 46 M.J. 311 (1996).

133. *Thomas*, 33 M.J. at 646.

134. *Id.* at 646 (citing United States v. Garries, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1987)).

> paid fishing expedition. Appellant has fallen far short of meeting his burden. No evidence before us suggests that the requested expert would uncover anything to add to the extensive information already in the record. Appellant's general assertions regarding uniqueness of the sentencing phase of a death penalty case are insufficient to establish the necessity and materiality of the expertise he is requesting.[135]

In *Loving*, as has already been discussed, the Court of Appeals for the Armed Forces specifically held that capital cases do not require mitigation specialists.[136] Then in *Gray*, the court found against the appellant on all issues regarding funding for experts. The opinion reasoned that counsel did not demonstrate necessity.[137] Unlike counsel in *Loving* and *Gray*, counsel in *Kreutzer* specifically requested a mitigation specialist at trial.[138] The Army Court of Criminal Appeals' then granted funding for the expert in *Kreutzer.*[139] This may signal a new trend toward encouraging military judges and convening authorities to liberalize grants for funding mitigation specialists at the trial court level. Otherwise, the court's order in *Kreutzer* only supports the inequitable result that defendants have more access to assistance after trial than before. Additionally, the *Kreutzer* order states that government appellate counsel did not object to the funding request. They based their reasoning "upon the fact that government funds were provided on appeal in two prior Army capital cases."[140] Although government attorneys in the future may try to distinguish funding grants on appeal from grants at trial, *Kreutzer* arguably indicates an increasing awareness within the Army of the importance of funding mitigation specialists in capital cases.

## IV. Evolving Standards Regarding Mitigation Specialists and Representation in Death Cases

The broad inquiry into mitigating evidence required at capital sentencing hearings necessitates experts who can guide and assist counsel in

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135. *Id.* at 647.

136. *Loving*, 41 M.J. at 250.

137. United States v. Gray, 51 M.J 1, 30 (1999). *See also* United States v. Gray, 40 M.J. 25 (C.M.A. 1994) (denying funding for an investigator).

138. United States v. Kreutzer, No. 9601044 (Army Ct. Crim. App. Dec. 15, 2000) (unpublished).

139. *Id.*

140. *Id.* (referring to *Loving* and *Murphy*).

investigating, organizing and presenting relevant evidence. In denying the request in *Thomas*, the Navy court asserted that funding a background investigation based on mere speculation amounts to a "paid fishing expedition."[141] Yet, conducting the type of investigation required to adequately present a capital mitigation case mandates that very fishing expedition. Unfortunately, military defense counsel are neither trained nor competent to conduct the in-depth inquiry needed to develop the sentencing evidence. The Navy court correctly acknowledged "a psychosocial investigation is not within the ken of a competent attorney."[142] The court then placed counsel between the proverbial rock and a hard place by requiring a clear showing of materiality and necessity before funding the assistance. The court fixes an unreasonable requirement on inexperienced attorneys by mandating a showing of what evidence the specialist will uncover before allowing an attorney the needed consultation.

An increased awareness of the importance of mitigation specialists and qualified counsel pervades contemporary legal thought regarding capital litigation. This section first reviews the American Bar Association's (ABA) 1997 resolution regarding guidelines for ensuring that experienced counsel represent defendants in capital cases.[143] Next, the section summarizes the invaluable services provided by mitigation specialists that cannot be replicated by untrained attorneys. Last, the section compares military capital cases and procedures to the recommendations and report on federal death penalty cases adopted on 15 September 1998, by the Judicial Conference of the United States.[144]

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141. United States v. Thomas, 33 M.J. 644, 648 (N.M.C.M.R 1991).

142. *Id.* at 647.

143. AMERICAN BAR ASSOCIATION, SECTION ON INDIVIDUAL RIGHTS AND RESPONSIBILITIES, REPORT WITH RECOMMENDATIONS ON RESOLUTION NO. 107 OF THE HOUSE OF DELEGATES (approved Feb. 3, 1997) [hereinafter ABA RESOLUTION AND REPORT], http://www.abanet.org/irr/rec107.html.

144. SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (adopted Sep. 15, 1998) [hereinafter JUDICIAL CONFERENCE RECOMMENDATIONS], http://www.uscourts.gov/dpenalty (4Report).

A. American Bar Association's 1997 Resolution Regarding Counsel Qualifications

On 3 February 1997, the ABA passed a resolution calling upon jurisdictions to cease executions until they implement procedures consistent with the ABA's capital litigation policies.[145] Because of the ABA's stature as a professional organization and its shouldering of the responsibility to conduct studies regarding the competence of counsel over the last twenty years, it is "especially well positioned to identify the professional legal services that should be available to capital defendants."[146]

In both *Loving* and *Gray*, the Court of Appeals for the Armed Forces specifically refused to judicially implement the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.[147] The ABA adopted the basic guidelines in February 1989 and adopted a specific policy regarding military defendants in 1996.[148] Because of the Supreme Court's view that inexperience alone does not raise a presumption of ineffectiveness, the military court elected not to set mandatory standards. Rather, it decided to continue evaluating counsel based on the quality of their representation under *Strickland.*[149] In each capital case, however, the military court will endeavor to "remain vigilant as to the quality of representation provided."[150] Although the result in *Gray* tends to obscure recent tendencies, the court appears poised to raise the bar of scrutiny in capital cases. Judge Cox's clear concerns expressed in *Curtis* further indicate a desire for qualified representation.[151]

The ABA's particularized push to establish standards for counsel in military death penalty cases implies an evolving movement within the legal community to ensure that service members receive adequate representation.

> [C]ourts have focused particularly on the obligation to investigate the defendant's mental health and deprived background because mitigating evidence drawn from these sources will be

145. ABA RESOLUTION AND REPORT, *supra* note 143.

146. *Id.*

147. *See* United States v. Gray, 51 M.J 1, 54 (1999); United States v. Loving, 41 M.J. 213, 237 (1994).

148. ABA RESOLUTION AND REPORT, *supra* note 143.

149. *Gray*, 51 M.J. at 54 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984)).

150. *Id.*

151. *See supra* notes 106-09 and accompanying text.

> especially powerful. Experience has demonstrated, however, that other types of mitigating evidence also may be persuasive to the sentencer and that the combination of mitigating evidence presented is critical. . . . Thus, the standard of a reasonable investigation in preparation for the penalty phase should encompass the ABA's view that such an investigation "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor" recognizing that both "mitigating" and "aggravating" evidence are terms that should be broadly defined.[152]

Of course, the key to adequate representation at sentencing remains full and complete presentation of all mitigating evidence. Not adopting the ABA's specific guidelines requiring counsel with extensive litigation and capital experience increases the need to provide understanding and know-how to the defense team through appointment of mitigation specialists.

## B. Role and Importance of Mitigation Specialists

The military cases surveyed in Section III clearly show the impact of failing to conduct an extensive investigation in preparation for the sentencing phase of a capital case. Also, "one of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information."[153]

> As a practical matter, the defendant probably has little or no chance of avoiding the death sentence unless the defense counsel

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152. Stetler, *supra* note 33 (quoting Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, U. ILL. L. REV. 323, 355-56 (1993) (citing AMERICAN BAR ASSOCIATION, GUIDELINES FOR APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES No. 11.4.1(C), (Feb. 1989))).

153. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.3. The report lists nine cases from 1995 to 1997, which illustrate set asides based on counsel's failure to investigate and present mitigation evidence. Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997); Hall v. Washington, 106 F.3d 742 (7th Cir. 1997); Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995), *cert. denied* 519 U.S. 909 (1996); Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995), *cert. denied* 517 U.S. 1111 (1996); Clabourne v. Lewis, 64 F.3d 1373 (9th Cir. 1995); Antwine v. Delo, 54 F.3d 1357 (8th Cir. 1995), *cert. denied* 516 U.S. 1067 (1996); Baxter v. Thomas, 45 F.3d 1501 (11th Cir.), *cert. denied* 516 U.S. 945 (1995); Jackson v. Herring, 42 F.3d 1350 (11th Cir.), *cert. denied* 515 U.S. 1188 (1995).

> gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant. Thus, defense counsel must conduct extensive investigation into the defendant's background—a task that may be difficult given that, first, law school prepares one to be an advocate, not an investigator, and second, funds may not be available to hire trained investigators. To the extent possible, however, the use of trained investigators, including mental health and mitigation experts, will greatly facilitate gathering information that may be sufficient mitigation to save the client's life.[154]

As indicated by the Navy court in *Thomas*, military courts are starting to realize that mitigation specialists provide expertise outside the ken of attorneys.[155] The National Legal Aid and Defender Association posits that the specialized nature of penalty phase investigation requires adequate training, knowledge, and experience not generally possessed by attorneys.[156] "Increasingly, lawyers defending death-penalty cases rely heavily on mitigation specialists, who build psychological profiles, dig up documentation of childhood traumas, and sometimes present expert testimony on behalf of clients."[157] The key to the success of any mitigation specialist is prior experience in the defense of capital cases.

> Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, have extensive training and experience in the defense of capital cases, and are generally hired to coordinate a comprehensive biopsychosocial investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary materials for them to review.[158]

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154. Jonathan P. Tomes, *Damned if You Do, Damned if You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 363 (1997).

155. United States v. Thomas, 33 M.J. 644, 647 (N.M.C.M.R 1991).

156. H. Scott Wallace, Director of Defender Legal Services, National Legal Aid & Defender Association, Affidavit of H. Scott Wallace (n.d.), *available at* http://www.nlada.org/DMS/Documents/998935028.947.

157. Jonah Blank, *Guilty—But Just How Guilty?*, U.S. NEWS ONLINE, Jan. 12, 1998, *at* http://www.usnews.com/usnews/issue/980112/12nich.htm.

158. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.7.

Extensive multigenerational evidence gathering results in massive amounts of data. The specialists create a summarized chronology, which usually consists of a 100-page linear distillation of patterns of influences in the defendant's life. The pictorial representation illustrates the cumulative effect of influences on his life. The mitigation specialist, unlike the attorney, possesses training and experience that allows him to logically organize and articulate the cumulative effects.[159] "[I]t is never one factor or impairment which results in social dysfunction and ineffectualness, but rather the cumulative effects of these factors."[160]

Jonathan P. Tomes provides a comprehensive definition of a mitigation expert: "a person qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant."[161] The limited number of capital cases in the military makes detailing relatively inexperienced counsel unavoidable. Neither mental health professionals nor criminal investigators in the military possess specialized training in death penalty mitigation investigations. However, the defense team need not proceed to trial without an expert qualified in death penalty cases. Liberally granting requests for mitigation specialists soon after preferral of charges will ensure effective representation by discovery of all relevant presentencing evidence before trial.

### C. Recomendation of the 1998 Judicial Conference of the United States

On 15 September 1998, the Judicial Conference of the United States adopted extensive recommendations made by the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services.[162] In response to judicial and congressional inquiries, the recommendations and accompanying report analyzed concerns about quality representation and cost-effectiveness in federal death penalty cases. Some of the factors

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159. Dr. Lee Norton, National Legal Aid & Defender Association, Affidavit of Dr. Lee Norton 9 (Mar. 2, 1994) [hereinafter Norton Affidavit] (on file with the author). Dr. Norton was the mitigation specialist requested in *United States v Kreuzer.*

160. *Id.* at 11.

161. Tomes, *supra* note 154, at 367.

162. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144.

addressed in the report shed light on how convening authorities and military judges should view requests for expert assistance in capital cases.

The average cost for representation (counsel and related services) in an authorized federal death penalty case between 1990 and 1997 was $218,112. The average cost when the Attorney General elected not to authorize a death-eligible case was $55,772. The cost when the Attorney General authorized a case, but the prosecution withdrew its request before trial was $145,806. Also, plea agreements significantly affected the overall costs associated with capital representation. The average cost when a case proceeded to trial was $269,139. In authorized cases eventually resolved by guilty pleas, representation averaged $192,333.[163] "Payment to experts are a substantial component of defense costs in federal death penalty cases . . . . [A]bout 19% of payments for representation in federal capital cases for FY 1997 went to services other than counsel: primarily experts and investigators."[164] In non-capital homicides, non-attorney compensation averaged $1,515. However, in authorized capital cases that went to trial, non-attorney costs averaged $53,143. Cases resolved by plea agreements cost $51,028. Even death-eligible cases where the Attorney General denied authorization cost an average of $10,094 for experts and investigators.[165]

According to the Judicial Conference report, a key factor increasing representation costs is seemingly unlimited prosecution resources.[166] "The Department of Justice reported an average total cost per prosecution of $365,296, but this figure does not include the cost of investigation or the cost of scientific testing and expert evaluations performed by law enforcement personnel."[167] Although there is no direct correlation between the government's cost of prosecuting a capital case in the military and in federal court, the general analogy fits. Furthermore, given the limited number of military death cases, improvement in the military system will only result by learning from the more saturated federal system.

Although the cost for defense counsel in federal cases does not translate into equivalent costs in the military, the expert assistance cost associated with adequate representation under current standards should compare closely. As in the federal system, defense can sometimes use experts pro-

163. *Id.* ¶ I.A.
164. *Id.* ¶ I.B.7.
165. *Id.*
166. *Id.* ¶ I.B.5.
167. *Id.*

vided by the government.[168] No government investigative assets, however, can adequately substitute for a trained mitigation specialist.

Surveying the fiscal requirements of trying capital cases in the federal system illustrates that high costs are simply part of the process. Convening authorities and military judges must recognize that defense attorneys in death penalty cases need adequate resources to meet demanding effectiveness requirements under the Sixth Amendment and today's legal landscape. Additionally, the extensive commitment of resources by the government in capital cases requires at least modest balancing. Particularly in light of the lack of capital experience likely to pervade the defense table in military cases, government officials must liberally authorize funding for assistance early in the trial process. Getting it right the first time will greatly benefit not only the defendant's interests, but also the military justice system as a whole.

> A number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the importance of "doing it right the first time," i.e., minimizing the time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level. Similarly, a former Florida Attorney General testified before an American Bar Association Task Force studying representation in state death penalty cases that, "[b]eyond peradventure, better representation at trial and on appeal will benefit all concerned."[169]

When rejecting the request for expert assistance at the appellate level in *Gray*, the Army Court of Criminal Appeals affirmed its recognition "that counsel may have to spend long hours in a capital case to zealously represent his client."[170] By this statement, the court implied that the attorney had not done enough to justify any need for assistance.[171] Without even reaching the burden of inexperience discussed throughout this article already, the increased workload alone calls for government officials to recognize the need for expert assistance. In addition to uncovering crucial

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168. *See, e.g.*, United States v. Loving, 41 M.J. 213, 240 (1994).

169. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.C.1 (quoting Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 65, 69-70 (1990)).

170. United States v. Gray, 32 M.J. 730, 736 (A.C.M.R. 1991).

171. *See id.*

evidence, such assistance can streamline the investigative and preparation process for defense attorneys.

Examining the hours billed by defense attorneys in the federal system provides a gauge for determining proportionally how much a military lawyer's workload will increase if detailed to a capital case. Between 1992 and 1997, in federal non-capital homicide cases, the average hours billed was 118 (18 in court, 100 out of court). The average number of hours billed in authorized death penalty cases was 1464 (231 in court, 1233 out of court). In cases that went to trial, the average was 1889 (409 in court, 1480 out of court), and pleas averaged 1262 (61 in court, 1201 out of court).[172] The workload appears to increase fifteen to twenty times in a capital case over a non-capital murder trial. Although assigning extra counsel may ease the load to some extent, the key to efficient and effective representation, particularly at sentencing, includes obtaining expert help.

By making an official recommendation that the federal defender program establish salaried positions for penalty-phase investigators, the judicial conference emphasized the growing importance of mitigation specialists. The commentary to the recommendation refers to mitigation specialists' work as "part of the existing 'standard of care' in federal death penalty cases."[173]

> Without exception, the lawyers interviewed by the Subcommittee stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase. Judges generally agreed with the importance of a thorough penalty phase investigation, even when they were unconvinced about the persuasiveness of particular mitigating evidence offered on behalf of an individual defendant.[174]

In touting the cost-effectiveness of creating positions for penalty phase investigators, the commentary further points out that adequately trained specialists are in short supply. Of course, providing the required expertise in death penalty cases results in increased costs.[175] For military practice, no Department of Defense agency specifically trains mitigation specialists. Therefore, meeting the current standard of care for capital cases mandates

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172. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.4.
173. *Id.* ¶ II.7.
174. *Id.* ¶ I.B.7.
175. *Id.* ¶ II.7.

that officials liberally grant funding for experts in investigating and presenting mitigation evidence.[176]

## V. Recommendations for How Best to Increase Defense Access to Mitigation Specialists

Sections II, III, and IV focused on surveying current law, identifying evolving trends, and analyzing the need for increased access to mitigation specialists in military cases. The analysis then concluded that the existing legal landscape calls for expanding the right to use specialized, penalty phase investigators. The question remains, however, of how best to ensure that defense counsel get the needed funding. This section recommends a three-pronged approach to improving requests for funding and defense counsel access to mitigation specialists. The approach includes a recommended change to RCM 703, granting capital defendants a right to an ex parte hearing to demonstrate the need for expert assistance at government expense.[177] A recommended executive order to effect the change follows the federal model of allowing an absolute right to an ex parte hearing for expert funding requests.[178] The second prong to the overall approach suggests that the Court of Appeals for the Armed Forces reexamine its language in *Garries* and *Kaspers*. The court should find that all capital cases involve "unusual circumstances" for purposes of creating an absolute right to *ex parte* hearings regarding expert assistance. The third prong stresses the need for educating convening authorities, staff judge advocates, and

176. Federal Rule of Criminal Procedure 32(c) already provides for a judicially supervised probation service to prepare presentencing reports for cases in the federal system. The impartial report includes an extensive investigation of any evidence relevant to sentencing, and it is provided to all parties in advance of the penalty phase. *See* FED. R. CRIM. P. 32(c). Standard practice in federal capital cases also calls for a one to two month delay between the merits and penalty phases of trial. This delay allows for preparation of the detailed presentencing report, particularly in death penalty cases. The judicial conference recommendations regarding access to mitigation experts takes on even more significance when considered against the backdrop of the information already provided to defense counsel in the presentencing report. In courts-martial, military defense counsel must proceed almost directly to the presentencing phase, without the benefit of an impartial investigation focused on sentencing factors, including extenuating and mitigating circumstances.

177. *See infra* app.

178. 18 U.S.C. § 3006A(e)(1) (2000).

justice managers on the benefits of granting mitigation specialists to defense counsel early in the process of potential capital cases.

A. Broad Systematic Changes and the Role of Fiscal Responsibility

One suggestion for providing increased access to mitigation specialists involves significantly increasing defense service budgets to allow expert funding without government-side involvement. A disadvantage of this solution is that estimating the cost of potential capital cases in advance and attempting to fence funds may not prove feasible. This is particularly true given the limited number of capital cases in the military and the differences between military services on how they provide representation to capital defendants. Additionally, the high cost of capital cases may necessitate approaching judges and convening authorities for funding beyond budget estimates. Thus, higher budgets alone do not alleviate the need for a solution within the capital litigation process itself.

Similarly, a suggestion for assigning permanent investigators to defense offices has merit in a general sense. The suggestion also mirrors the 1998 Judicial Conference recommendations for the federal defender system.[179] The fluid nature of military assignments, however, creates the problem of never being able to get an investigator to an adequate level of specialized training and experience for capital cases. Creating more permanent positions faces the initial difficulty of squaring mitigation investigators with manpower requirements. Mandating a certain number of psychiatrists, psychologists, or social workers in regions throughout the Department of Defense to train as mitigation investigators runs into the systemic problem of changing units' missions and reallocating resources within organizations not directly tied to the military justice system. A solution most likely to succeed, therefore, must focus on minor changes to the rules governing capital cases.

Another broad-based solution would be automatic funding for mitigation specialists in capital cases. After all, an automatic funding provision would easily answer the mail regarding the established need for increased defense access in military capital cases. Requiring the government to grant requests for a reasonable amount of funding for a mitigation investigator in every capital case, however, ignores the pragmatic reality that every case is different. The facts in particular cases might require different types

179. *Id.*

of experts. In the unlikely event that very experienced military attorneys or even civilian attorneys take a case, there may be a more limited need for mitigation assistance. Arguably, in some cases, the defense will simply not be able to show any need for a mitigation specialist at all.

Similar to *Loving*, a number of state courts have recently examined whether or not refusing to provide funds for mitigation specialists constitutes error. For example, appellate courts in Pennsylvania, Alabama, Ohio, Oregon, and Illinois upheld trial court decisions to deny mitigation experts.[180] On the other hand, "the Supreme Court of Indiana recently found [a] trial court's limitation of a mitigation expert to twenty-five hours of investigation to be arbitrary and an abuse of discretion."[181] Also, the Supreme Court of Georgia reversed a death sentence by holding that a mitigation expert would have helped the defendant prepare a more meaningful and artful sentencing case.[182] Evolving standards regarding mitigation specialists have not yet led to sweeping judicial and statutory mandates for automatic funding in death cases. Precedent is developing in some states, however, concerning their increasing importance. Additionally, many states now allow defendants to request expert assistance in ex parte hearings.[183] Although these states generally require necessity showings, the ex parte procedure assists the defendant greatly in obtaining access to the specialists.

The government's "substantial interest in protecting its fisc does mitigate in favor of its being allowed notice and some ability to dispute requests that may needlessly drain its resources."[184] The evolving "stan-

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180. Tomes, *supra* note 154, at 374-75. Tomes cites several cases that indicate a reluctance to absolutely require mitigation specialists in capital cases. *See* Commonwealth v. Reid, 642 A.2d 453 (Pa. 1994) (upholding trial court's refusal to approve county funds for particular psychologist as mitigation expert); Arthur v. State, No. CR-91-718 1996 Ala. Crim. App. LEXIS 44 (Ala. Crim App. 1996) (upholding denial to fund expert social worker as mitigation expert when no showing of particularized need); State v. Lott, Nos. 66389, 66390, 66588 1994 Ohio App. LEXIS 4965 (Ohio Ct. App. 1994) (holding that mere assertions that expert would be useful not enough to require funding); State v. Langley, 839 P.2d 692 (1992) (upholding denial where defendant could not show why particular expertise of investigator necessary); People v. Whitehead, 662 N.E.2d 1304 (Ill. 1996) (finding that denial of expert to investigate and prepare mitigation evidence did not deny effective assistance of counsel); People v. Burt, 658 N.E.2d 375, 398 (Ill. 1995) (finding that mitigation expert was not essential to marshal evidence in mitigation because defense counsel could obtain and present).

181. Tomes, *supra* note 154, at 375 (quoting Williams v. State, 669 N.E.2d 1372, 1384 (Ind. 1996)).

182. *Id.* at 376 (citing Bright v. State, 455 S.E.2d 37, 51 (Ga. 1995)).

183. *Id.*

dard of care" in death penalty cases certainly involves the work of mitigation specialists,[185] but the merits of granting funding for particular specialists in particular cases must still face scrutiny at some level. To fashion a rule in the military where the defense has no requirement to justify its "fishing expedition"[186] with at least a minimal showing of necessity, ignores commanders' and judges' fiscal and pragmatic responsibilities. It also ignores the Court of Appeals for the Armed Forces' unequivocal holding in *Loving*, declining to mandate mitigation specialists in all capital cases.[187] Thus, the necessity standards articulated earlier in the article serve some legitimate purpose, even in capital cases. They balance the defendant's Sixth Amendment right to the tools and "raw materials integral to building an effective defense,"[188] with the government's interest in preventing the waste of funds.[189] The time has come, however, to recognize the increasingly important role played by mitigation specialists in capital cases. That recognition requires tempering the current reluctance to fund needed specialists by enacting a change to RCM 703, thereby balancing the scales.

## B. Recommended Changes Under RCM 703 and Military Case Law

### *1. Overview of Prongs 1 and 2—RCM 703 Change and "Unusual Circumstances"*

Creating a right under RCM 703 to ex parte requests in capital cases will help defense counsel make a more detailed showing of necessity without compromising elements of their case. The change will send a message to military judges regarding the evolving importance of expert assistance during the penalty phase of death cases. Limiting the right for ex parte hearings to capital cases will illustrate to judges and convening authorities

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184. Louisiana v. Touchet, 642 So. 2d 1213, 1220-21 (La. 1994) (holding that indigent defendant's expert assistance request may be filed ex parte). (*Editor's Note: A "fisc" is the state's treasury.*)

185. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ II.7.

186. United States v. Thomas, 33 M.J. 644, 648 (N.M.C.M.R 1991).

187. United States v. Loving, 41 M.J. 213, 250 (1994).

188. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

189. Donna H. Lee, Note, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV 154, 188 (1992).

that the "death is different" principle[190] applies when considering expert requests.

The change will also signal staff judge advocates and convening authorities that denying requests for expert assistance in capital cases may result in a higher level of judicial scrutiny following referral or at the appellate level. Because funding requests will have a greater chance of success in a one-sided, ex parte hearing, government officials would likely be more reasonable and yielding in response to defense requests to the convening authority. The nature of negotiations with the convening authority over capital case experts would likely shift slightly away from discussions of whether or not the defense gets a specialist. Instead, the discussions would likely focus on how much the defense gets to spend. This shift in focus will help meet the objective of increasing defense access to mitigation specialists, while allowing the government to still exercise fiscal responsibility.

The second prong of the article's recommendation regarding *Kaspers* and *Garries* is inextricably intertwined with the first prong. Both call for ex parte showings of necessity. The second prong simply suggests a more immediate judicial method for solving the problem of limited access. By expanding its interpretation of "unusual circumstances"[191] to always include capital cases, the Court of Appeals for the Armed Forces can essentially implement the recommended changes to RCM 703. The first prong, however, provides an easier and more effective method for amending the rules regarding experts in capital cases. Judge advocates and executive branch officials can control the boundaries of the change to RCM 703 and avoid judicial fiat by the military court. The remainder of this section includes a general discussion of support for ex parte requests arising from the Sixth Amendment and the Supreme Court's decision in *Ake*. Then the analysis compares the status of ex parte law in the military as surveyed in Section II, with two potential models for crafting the recommended changes to case law and RCM 703.

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190. Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

191. United States v. Kaspers, 47 M.J. 176, 179-80 (1997); United States v. Garries, 22 M.J. 288, 291 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).

*2. Ex Parte Requests Under Ake v. Oklahoma and the Sixth Amendment*

Donna H. Lee argues that *Ake v. Oklahoma* establishes a constitutional mandate for ex parte expert requests.[192] *Kaspers* specifically denies an absolute right to such requests in the military,[193] and the Supreme Court has not specifically created an absolute constitutional right to ex parte showings of necessity. Lee's compelling arguments regarding the Sixth Amendment guarantee to effective assistance of counsel, however, apply to the current analysis regarding mitigation specialists. "Forcing an attorney to choose between applying for expert assistance and revealing her defense strategy to the prosecution constitutes a state-imposed disability which interferes with a defendant's right to effective assistance of counsel."[194]

As *Lee* asserts, *Ake* clearly establishes a right to needed assistance. Government advocates interested in gaining access to confidential defense information might argue that revealing extensive information in an open hearing is a fair price to pay for getting funding. A fair trial with a reliable result, however, requires effective assistance of counsel, unencumbered by undue government interference.[195] Particularly in a capital trial, the reliable result includes the sentencing phase. Absent ex parte hearings, convening authorities may summarily deny early requests for experts to allow trial counsel extensive discovery of otherwise confidential information. This arguably impairs "the ability of counsel to make independent decisions about how to conduct the defense."[196]

In general, defendants do not fare well when they raise ineffective assistance for using mitigation specialists.[197] However, "many more cases involve failing to request the assistance of mitigation experts or failure to call them as witnesses."[198] If counsel limit necessity showings to protect damning confidential or strategic information, they run the risk of not only losing out on an expert, but also being found ineffective. Ex parte

192. Lee, *supra* note 189, at 190-01 (citing *Ake*, 470 U.S. at 82).
193. United States v. Kaspers, 47 M.J. 176, 180 (1997).
194. Lee, *supra* note 189, at 182.
195. *Id.* at 182-83.
196. *Id.* at 183
197. Tomes, *supra* note 154, at 385.
198. *Id.* at 386.

requests are a "necessary corollary" to ensuring access to mitigation experts.[199]

*3. Model 1 for Implementing Ex Parte Procedures—Federal Statutory Rule*

Even before *Ake*, Congress established a right to ex parte requests for assistance in the federal system under the United States Code.[200] The federal rule provides the first potential model upon which to base new military rules. During hearings by the Senate Judiciary Committee on the Criminal Justice Act of 1964, numerous scholars highlighted the importance of being able to apply for assistance in ex parte hearings. The concerns raised by the academicians, as well as various members of Congress, led to the adoption of the right to request expert assistance ex parte.[201] One such concern is particularly instructive.

> Senator Hruska, acting Chair of the Committee, cautioned that without an ex parte procedure, "the penalty for asking for funds for services may be the disclosure, prematurely, and ill-advisedly, of a defense." In his judgment, "[t]his would be paying too heavy a price for the funds a defendant is asking for."[202]

The Court of Appeals for the Armed Forces distinguished the federal rule from military practice in *Kaspers*.[203] The court acknowledged, however, that the appellant persuasively argued that "counsel often treads lightly with the famous Sword of Damocles hanging over them when

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199. Lee, *supra* note 189, at 186.

200. *See* 18 U.S.C. § 3006A(e)(1) (2000).

> Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary the court . . . shall authorize counsel to obtain the services.

*Id.*

201. Lee, *supra* note 189, at 157-58. The article provides an excellent summary of pertinent comments from congressmen and scholars regarding how to best ensure adequate services for representation.

202. *Id.* at 158 (quoting *Criminal Justice Act of 1963: Hearings on S. 63 and S. 1057 Before the Senate Comm. on the Judiciary*, 88th Cong. 32-33 (1963)).

203. United States v. Kaspers, 47 M.J. 176, 180 (1997).

attempting to justify expert requests to the military judge."[204] Although military practice may not require ex parte requests as a general rule, death penalty cases require special consideration. The type of confidential information likely to persuade a military judge to grant a request for a mitigation specialist tends to be particularly sensitive given the high and irreversible stakes in a capital trial. Counsel will often have to weigh whether or not potentially mitigating evidence creates a two-edged sword that also supports execution. The dilemma necessitates ex parte hearings to acquire assistance in evaluating the propriety of presenting the evidence.

*4. Model 2 for Implementing Ex Parte Procedures—North Carolina Case Law*

North Carolina case law,[205] as adopted by Louisiana in *Louisiana v. Touchet*,[206] provides a second potential model for promulgating a new military rule. A number of states make ex parte procedures available statutorily;[207] other states make such procedures available through case law.[208] Some states, similar to the federal system, grant an automatic entitlement to the defendant for an ex parte hearing to show necessity.[209] Other states more closely resemble the current military practice of allowing ex parte requests only under certain circumstances. There is no readily identifiable procedural trend among the states for how to allow ex parte requests.[210] The North Carolina rule, however, represents an example of how some states split the difference between creating an automatic entitlement to ex parte hearings and requiring a threshold showing of unusual circumstances before even allowing an ex parte application.

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204. *Id.*

205. State v. Phipps, 418 S.E.2d 178 (N.C. 1992) (holding that ex parte hearings on government funding for expert assistance was within discretion of trial court, but indigent must demonstrate particularized prejudice after initial ex parte application). *See also* State v. Ballard, 428 S.E.2d 178 (N.C. 1993) (allowing ex parte hearings on government funding for expert assistance).

206. 642 So. 2d 1213 (La. 1994).

207. *Id.* at 1218 (referring to California, Kansas, Minnesota, Nevada, New York, and Tennessee).

208. *Id.* (citing cases from Arkansas, Florida, Georgia, Hawaii, Indiana, Michigan, North Carolina, Oklahoma, and Washington).

209. *Id.* at 1226 (referring to California, Kansas, Minnesota, Nevada, New York, and Tennessee).

210. *Id.* (Orticz, J., dissenting).

The North Carolina model is not a major departure from the current military practice of leaving the ex parte decision to the discretion of the trial judge. Unlike the federal rule, North Carolina does not provide for an automatic entitlement to ex parte treatment of necessity showings.[211] North Carolina does entitle a defendant to make an initial ex parte application with the trial court.[212] This differs from the current military rule, which requires a showing of unusual circumstances before the military judge will even consider an ex parte showing.[213]

The initial application under North Carolina law must articulate a particularized prejudice to the defendant to keep the funding determination under ex parte proceedings. As interpreted by the Supreme Court of Louisiana when adopting the North Carolina rule, the prejudice showing for this second model does not present a difficult hurdle to cross.

> This is not an especially harsh result, as a defendant need only make a showing that certain essential and potentially meritorious elements of his defense will be disclosed to the state if there is a contradictory hearing on the request for funds, and that these elements are not obvious to the state.[214]

Thus, the emphasis under the North Carolina model is on allowing the initial ex parte request and then requiring a relatively low threshold showing of particularized prejudice. Under current military case law,[215] the defendant is unlikely to even get into the ex parte arena unless he can establish unusual circumstances. Further, *Kaspers* and *Garries* do not clearly establish guidelines for defining what situations fall under the rubric of unusual circumstances.

*5. Selecting the Appropriate Model*

Unfortunately, the North Carolina model does not go far enough to ensure adequate protection of information for defense counsel in capital cases. Therefore, it is unlikely to bring about the desired effect in the military of highlighting the importance of experts in death cases and increas-

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211. *See* 18 U.S.C. § 3006A(e)(1) (2000).

212. *See Touchet*, 642 So. 2d at 1220.

213. *See* United States v. Kaspers, 47 M.J. 176, 179-80 (1997); United States v. Garries, 22 M.J. 288, 291 (C.M.A. 1986), *cert. denied* 479 U.S. 985 (1986).

214. *See Touchet*, 642 So. 2d at 1220.

215. *See* cases cited *supra* note 213.

ing access to mitigation specialists. The North Carolina model would make an incremental change by adjusting the standard judges use in exercising their discretion on the ex parte decision. The initial entitlement to submit an ex parte application and the low threshold for showing possible prejudice would provide more protection than afforded under the current "unusual circumstances" standard. Because discretion remains with the trial court, however, the change may not send the desired signal regarding more liberal grants of funding for mitigation specialists.

Also, military judges may fail to distinguish between the North Carolina model and the old standard. Judges that are loath to consider ex parte requests because they disadvantage the party that must eventually provide funding may elect to construe the new standard as substantially similar to the old standard. A judge inclined to consider facts and rulings in open court could argue that the rule changes nothing except when the judge considers whether to continue the proceedings in an ex parte fashion. Because capital cases inevitably result in extensive appellate litigation, attorneys would test the bounds of the judge's ex parte discretion in almost every case.

To minimize confusion, a change to the rules should attempt to avoid applying a completely new legal standard. Although the judge must ultimately exercise discretion in making a ruling on the necessity for an expert, the courts have already established clear methods of analysis for that decision. The North Carolina model changes too little by leaving ex parte discretion in the hands of the trial judge. It changes too much by laying out a completely new legal standard for determining if ex parte proceedings are appropriate. Additionally, because the model establishes no absolute right to an ex parte hearing, the distinction between old and new and any intended consequences may be lost on convening authorities and practitioners.

Owing to the North Carolina model's shortcomings, a variation of the federal model will best serve the military.[216] The federal rule sets a clearly delineated standard. Practitioners and convening authorities will neither miss the new rule nor its possible ramifications. A slight variation to the federal rule seems necessary, however, to reach the objective of ensuring that decision-makers treat expert requests in capital cases with increased liberality. Unlike the federal rule, which applies to all cases, the proposed change would apply an absolute right to ex parte procedures only in capital

216. *See infra* app.

cases. This variation logically follows from the increased scrutiny that counsel and judges face in death cases. Applying the change only to capital litigation highlights the Supreme Court's opinion that death should be treated differently, and relevant mitigation encompasses a broader range of possibilities than in a non-capital case.[217]

Using the federal model will also minimize any confusion in applying the new rule. In general, the change will continue to use current legal standards for evaluating ex parte requests. It simply sets a bright line rule by guaranteeing the right to proceed ex parte in capital cases.

Using the variation of the federal model also provides an easy method for the judiciary to go ahead and implement the change through case law. The Court of Appeals for the Armed Forces need only overturn its ruling in *Kaspers* and *Garries* as they apply to capital cases. All capital cases will then fall under the rubric of "unusual circumstances." Given the heightened scrutiny applied to such cases, the ruling does not pose a significant threat to established precedent in non-capital cases. Also, by maintaining the same "unusual circumstances" standard for evaluating whether or not ex parte hearings are appropriate, the federal model avoids the confusion and legal testing likely under the North Carolina model.

Finally, the proposed change will maintain the balancing role of the military judge in evaluating the necessity of experts against the fiscal concerns of the government. By holding the hearings ex parte, the military judge will view all possible justifications for expert assistance. This clear picture of a defendant's case and circumstances should lead to an accurate and complete assessment of need the first time around. Additionally, by keeping the requirement that counsel must first ask the convening authority for funding,[218] government officials will still have an opportunity to weigh in with their particularized fiscal concerns. They may also suggest and offer alternative experts. Defense counsel will need to show denial by the convening authority before proceeding ex parte to the judge. As part of the record, the military judge will possess the concerns expressed by the convening authority in his initial denial of the expert request. The denial will arm the military judge with the convening authority's concerns, and the more extensive ex parte showing of necessity will ensure that the judge has all relevant defense information. He will then act as a well-informed

217. *See* Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976).

218. MCM, *supra* note 18, R.C.M. 703(d).

gatekeeper regarding the expert request to satisfactorily balance competing concerns and protect all parties' interests.

### C. Access Before Referral and the Importance of Educating Government Officials

Because military judges do not take control of cases before referral to courts-martial,[219] the ex parte rules discussed in this article only directly assist defense counsel after referral. However, defense counsel must effectively advocate for a non-capital referral prior to the convening authority sending the case to court. With regard to federal cases, "the first job of the defense is to convince the Department of Justice not to certify the case as a capital case. [M]itigation expenses, including the use of increasingly specialized experts, are increasing and are occurring early in the process."[220] "Counsel must conduct a wide-ranging preliminary investigation of facts relevant to sentencing before the Justice Department makes the decision whether to file a notice seeking the death penalty."[221] Zealous representation prior to referral in a military case differs little from the job of defense counsel in the federal system before the Attorney General authorizes prosecutors to seek death. Therefore, military defense counsel need access to mitigation specialists even before the Article 32 pretrial investigation.[222]

As previously discussed, allowing capital defendants ex parte access to the military judge should have the secondary effect of causing convening authorities to look more favorably on requests made earlier in the process. If for no other reason than to maintain some control over the power of the purse, government attorneys should increase their willingness to negotiate funding limitations pre-referral. This negotiation will facilitate earlier defense access to experts.

Educating military justice managers, staff judge advocates, and convening authorities regarding mitigation specialists will provide an additional impetus for expanding defense access to experts prior to referral.

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219. *See id.* R.C.M. 601.

220. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.7 (quoting COOPERS & LYBRAND CONSULTING, REPORT ON COSTS AND RECOMMENDATIONS FOR THE CONTROL OF COSTS OF THE DEFENDER SERVICES PROGRAM IV.24 (Jan. 28, 1998)).

221. *Id.* ¶ I.B.6.

222. *See generally,* MCM, *supra* note 18, R.C.M. 405 (detailing pretrial investigation procedures).

Because of the limited number of capital cases in military practice, only the defense services tend to send counsel to focused death penalty training. Continuing legal education courses for justice managers and government attorneys cannot afford to gloss over the increasingly important role of mitigation specialists in capital cases. Recitation of the *Loving* rule,[223] in which the Court of Appeals for the Armed Forces declined to require mitigation specialists in capital cases, does not adequately address the benefits to both sides of granting funding requests. Instead, the benefits of granting requests for mitigation specialists should be incorporated into all capital litigation training. One clear benefit involves the possibility of presenting more complete information to the convening authority prior to the referral decision. A discerning commanding general will always seek the most information available before acting in his judicial capacity. Also, avoiding a potentially unsuccessful capital referral pays not only fiscal dividends, but avoids unnecessary negative public exposure.

Training courses must discuss the increasing importance of mitigation specialists across the legal landscape. This training should include a lengthy discussion of the role played by such specialists and the type of evidence and information they provide to the defense. Even military case law regarding experts is not as clear as *Loving* might indicate. Government counsel must understand the recent case law granting experts to assist in death penalty cases at the appellate level. Insulating the case for appeal should also concern government counsel and convening authorities. The time, energy, and resources poured into capital prosecutions may be quickly undermined by an unwise decision to save a few dollars on an expert at trial. Finally, with the advent of life without parole as a possible sentence, allowing defense counsel to make a comprehensive mitigation pitch prior to referral may lead to quicker resolution of the case through a pretrial agreement.

## VI. Conclusion

Justice and expediency both require that the military justice system get it right the first time in all death penalty cases. As the rest of Sergeant Kreutzer's story unfolds on appeal, the consequences of not getting it right may become evident. An area ripe for challenge in capital cases involves full and complete presentation of all mitigation evidence during the penalty phase. The evolving legal landscape recognizes the increasingly

223. United States v. Loving, 41 M.J. 213, 250 (1994).

important role of mitigation specialists in developing the case on sentencing. Although somewhat premature to speculate, a comprehensive and organized presentation of Sergeant Kreutzer's case in extenuation and mitigation may have influenced the ultimate result. Such a complete presentation of the evidence required supplementing the defense team with an experienced and trained death penalty mitigation specialist. The proposed rule for expert assistance requests in capital cases will bring the military in line with progressive jurisdictions and help to avoid inadequate presentencing hearings in the future.

Evolving capital litigation standards and an increasing awareness of the important role played by penalty phase investigators demand that the military justice system take affirmative steps to make mitigation specialists more readily accessible. The three-pronged approach to facilitating more liberal funding grants constitutes a solid first step. Promulgating the new rule provides a relatively limited and unobtrusive way of helping defense counsel obtain access to experts, while signaling a clear recognition by the military services of the increasing importance of experts in capital cases. As expressed by Judge Cox in the first *Curtis* case, death is in fact inevitable.[224] When death results by way of an executioner, however, society demands that the justice system make no mistakes. Reliability in individually selecting defendants for the death penalty requires consideration of all mitigating factors. Reliability in finding and presenting all possible factors requires the assistance of a mitigation specialist.

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224. United States v. Curtis, 44 M.J. 106, 167 (1996).

## APPENDIX

### EXECUTIVE ORDER XXXXX
### AMENDMENTS TO THE MANUAL FOR COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. §§ 801-946), in order to prescribe amendments to the Manual for Courts-Martial, prescribed by Executive Order 12,473, as amended by Executive Order 12,484, Executive Order 12,550, Executive Order 12,586, Executive Order 12,708, Executive Order 12,767, Executive Order 12,888, Executive Order Executive Order 12, 936, Executive Order 12,960, Executive Order 13,086, and Executive Order 13,140, it is hereby ordered as follows:

**Section 1**. Part II of the Manual for Courts-Martial, United States, is amended as follows:

a. RCM 703(d) is amended as follows:

(d) *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. <u>In cases referred capital, requests to obtain investigative, expert, or other services necessary for adequate representation, which are denied by the convening authority, may be renewed before the military judge in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are relevant and necessary, the military judge shall order the Government to provide funding for the services</u>. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the

ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.